Airway Cleaners, LLC *and* Local 32BJ, Service Employees International Union and Local 660, United Workers of America. Case 29–RC–153440

April 18, 2016

ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The Intervenor's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

Dated, Washington, D.C. April 18, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Member Miscimarra, concurring.

The Employer provides cleaning and maintenance services for various air carriers at John F. Kennedy International Airport, and it has repeatedly taken the position that it is exempt from the Board's jurisdiction and instead subject to the jurisdiction of the National Mediation Board (NMB) under the Railway Labor Act (RLA) due to the control allegedly asserted over its operations by air carriers that are themselves subject to the RLA. See Sec. 2(2) of the Act (excluding from the definition of "employer" "any person subject to the Railway Labor Act"). The National Mediation Board (NMB) rejected the Employer's position in *Airway Cleaners, LLC*, 41 NMB 262 (2014), and the National Labor Relations Board (NLRB) thereafter asserted jurisdiction over the Employer in *Airway Cleaners, LLC*, 362 NLRB No. 87, slip op. at 1 fn. 2 (2015). The Intervenor, Local 660 of the United Workers of America, now contends that more recent events require the NLRB to reverse its 2015 decision and find that the Employer is outside the NLRB's jurisdiction.[1]

I reject Local 660's claim, but only because of the two reasons set forth in Part A below.[2] However, for the reasons set forth in Part B, I believe that Local 660 has

[1] We agree with the Regional Director that the Intervenor has failed to establish jurisdictionally significant changes since the Board asserted jurisdiction over the Employer in *Airway Cleaners, LLC*, 362 NLRB No. 87 (2015), after the National Mediation Board concluded, in *Airway Cleaners, LLC*, 41 NMB 262 (2014), that the Employer was not covered by the Railway Labor Act. We also reject the Intervenor's contention that the Board's jurisdiction is called into question by our decision in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015) (*Browning-Ferris*), on the theory that, under the standard stated in that case, the Employer might be a joint employer with an air carrier exempt from the Board's jurisdiction pursuant to Sec. 2(2) of the Act. The Board stated in *Browning-Ferris* that its decision in that case did not "modify any other legal doctrine, create 'different tests' for 'other circumstances,' or change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act." *Browning-Ferris*, above, slip op. at 20 fn. 120. Moreover, contrary to our concurring colleague's arguments, the fact that the Employer may potentially be a joint employer with an air carrier beyond our jurisdiction does not change the fact that the Board does not employ a joint-employer analysis to determine jurisdiction. See *Management Training Corp.*, 317 NLRB 1355, 1358 fn. 16 (1995) ("[W]e will not employ a joint employer analysis to determine jurisdiction. Whether the private employer and the exempt entity are joint employers is irrelevant. The fact that we have no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table does not destroy the ability of private employers to engage in effective bargaining over terms and conditions of employment within their control."); see also *Browning-Ferris*, supra, slip op. at 13 fn. 70.

We also reject our colleague's reliance on *Northwestern University*, 362 NLRB No. 167 (2015), as an example of the Board declining to assert jurisdiction because it lacks jurisdiction over other employers in the same industry and asserting jurisdiction would not promote uniformity and stability in labor relations. As we expressly emphasized in *Northwestern*, that consideration was "peculiar" to that case because other industries—such as the industry here—"are not characterized by the degree of interrelationship present among and between teams in a sports league." Id., slip op. at 5 fn. 22. Moreover, here the Board has previously asserted jurisdiction over the Employer, the NMB has declined to assert jurisdiction over the Employer, and there is no evidence that the Employer's competitors are not subject to the Board's jurisdiction.

We agree with the Regional Director that the hearing officer did not abuse her discretion by closing the hearing despite the possibility that "a few" documents responsive to a subpoena served on the Employer by the Intervenor remained unproduced. As the Regional Director found, the Employer produced the "vast majority of documents" sought by the Intervenor regarding instances of air carrier control over the Employer's operations and discipline of employees, and the marginal probative value of any additional documents regarding that subject did not justify the further delay that leaving the hearing open would have occasioned.

[1] For the purposes of this case only, the Employer did not challenge the Board's jurisdiction.

[2] I also agree with my colleagues that the hearing officer did not abuse her discretion by closing the hearing despite the possibility that "a few" documents responsive to the Intervenor's subpoena remained unproduced. Like my colleagues, I believe that the hearing officer reasonably concluded that the probative value of any remaining documents did not justify a delay in this case where the "vast majority" of responsive documents had already been produced and the remaining documents, if any, appeared to be cumulative at best.

raised a substantial issue regarding the potential lack of Board jurisdiction.

A. The Board Should Exercise Jurisdiction Over the Employer

For two reasons, I concur with the Board's exercise of jurisdiction in the instant case, notwithstanding the arguments raised by Local 660, which I believe are compelling for the reasons discussed in Part B of this opinion.

First, the Board gives substantial deference to the NMB's jurisdictional determinations, see, e.g., *DHL Worldwide Express, Inc.*, 340 NLRB 1034 (2003), and the NMB's decision to decline jurisdiction over the Employer, although not unanimous,[3] supports a finding that the Board has jurisdiction in the instant case. Failure to assert jurisdiction in the face of the NMB's decision would leave the Employer subject to neither statute, condemning the Employer and its employees to a jurisdictional "no-man's land." Congress has expressed its disapproval of such a "no-man's land" in another context, and I believe it would be contrary to the intent of Congress to create one here.[4]

Second, I disagree with the joint-employer standard adopted by the Board in *BFI Newby Island Recyclery*[5](*Browning-Ferris*), and that standard furnishes the basis of Local 660's jurisdictional argument. Local 660 contends that (i) the Board's decision in *Browning-Ferris* effected a "seminal change" in the joint-employer standard that applies under the National Labor Relations Act (NLRA); (ii) under this new standard, Airway Cleaners must be regarded as a joint employer with air carriers subject to the RLA; and (iii) "given this joint employer status, the Board cannot assert jurisdiction in this matter." I believe this argument by Local 660 raises substantial issues, and under the expansive joint-employer standard the Board adopted in *Browning-Ferris*, it would be improper for the Board to assert jurisdiction over Airway Cleaners. See Part B below. However, I do not support relinquishing jurisdiction on this basis because I disagree with the *Browning-Ferris* joint-employer standard for the reasons that former Member Johnson and I explained at length in our *Browning-Ferris* dissenting opinion.[6] Accordingly, although I am sympathetic to the position asserted by Local 660, I agree that the Board should assert jurisdiction here, especially given the NMB's finding (albeit in a divided decision) that it lacks jurisdiction over Airway Cleaners.

B. Reasons Why Browning-Ferris Warrants a Finding that the Board Lacks Jurisdiction

The Board majority does not disclaim the applicability of *Browning-Ferris* to the potential joint-employer status of Airway Cleaners and its air carrier clients, which are subject to the RLA, not the NLRA. Thus, I believe Local 660 raises a substantial issue regarding the absence of NLRB jurisdiction here. In fact, Member Johnson and I alluded to this precise potential problem in our *Browning-Ferris* dissent. There, Member Johnson and I discussed a hypothetical service company, CleanCo, and its Clients A, B and C. In a paragraph headed "Potential Board Jurisdiction Over Some Entities and Not Others," we stated in relevant part:

> The Board does not have jurisdiction over . . . railways or airlines that are subject to the Railway Labor Act. . . . If CleanCo is subject to the NLRA, but Clients A, B, or C fall within one or more of the exempt categories identified above, the majority's new standard will create complex questions *about whether the Board may lack jurisdiction over particular "joint" employer(s).*[7]

One of my objections to the expansive joint-employer standard adopted in *Browning-Ferris* (though certainly not the only objection) was that it could preclude the Board from asserting jurisdiction when some joint-employer entities are subject to the RLA. This situation is made worse by the Board majority's holding in *Browning-Ferris* that when two entities constitute a joint employer, the Board requires *each* entity to engage in

[3] NMB Member Geale, who is now Chairman of the NMB, dissented from the NMB majority's opinion in *Airway Cleaners.* See 41 NMB 262 (Member Geale, dissenting in relevant part).

[4] See Sec. 14(c) (authorizing NLRB to decline jurisdiction over certain labor disputes, but providing that "[n]othing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the [NLRB] declines . . . to assert jurisdiction"). Sec. 14(c) eliminated a jurisdictional "no-man's land" that had previously existed because states were prohibited from acting in certain cases where the Board had elected to decline jurisdiction, a state of affairs that Congress disfavored. See Cong. Record (Senate) 3524 (March 12, 1959) (remarks of Sen. McClellan) (leaving parties with no remedy in cases where NLRB declined jurisdiction but states were prevented from acting was an "absurd and unhealthy situation"), 2 Leg. History Labor-Management Reporting and Disclosure Act of 1959, at 1007; Cong. Record (House) 14492 (Aug. 13, 1959) (remarks of Rep. Smith) (no-man's land denies employers and employees "equal protection of the laws"), 2 Leg. History Labor-Management Reporting and Disclosure Act of 1959, at 1664.

[5] 362 NLRB No. 186 (2015).

[6] Id., slip op. at 21–50 (Members Miscimarra and Johnson, dissenting).

[7] Id., slip op. at 40 (Members Miscimarra and Johnson, dissenting) (emphasis added).

bargaining "with respect to such terms and conditions which it possesses the authority to control."[8]

To the extent that the *Browning-Ferris* standard makes Airway Cleaners a joint employer together with its air carrier customers, then Airway Cleaners cannot conceivably satisfy the bargaining obligations imposed under *Browning-Ferris* because its other joint-employer entities are not subject to the NLRA. In a different context, similar considerations prompted the Board, in *Northwestern University*,[9] to decline jurisdiction over Northwestern's grant-in-aid scholarship football players because every other school in Northwestern's Big Ten conference and the overwhelming majority of the University's competitors in the NCAA Division I Football Bowl Subdivision (FBS) are public institutions over which the Board lacks jurisdiction.[10]

Accordingly, for the reasons stated above, I concur in the Board's exercise of jurisdiction in the instant case.

Dated, Washington, D.C. April 18, 2016

Philip A. Miscimarra, Member

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[8] Id., slip op. at 16. In my view, the jurisdictional problems created by *Browning-Ferris* put that decision at odds with *Management Training Corp.*, 317 NLRB 1355 (1995), where a Board majority held that the Board's lack of jurisdiction over an exempt government entity that controls the economic terms of a joint employer's employees would not preclude the Board from selectively imposing NLRA bargaining obligations regarding noneconomic terms on the other entity (a private contractor) within that joint-employer pair. Id. at 1358–1359. In any event, I agree with the views expressed by former Member Cohen in *Management Training*, who dissented from the Board majority's assertion of jurisdiction over an employer when the Board lacks jurisdiction over the entity that controls economic terms and conditions of employment. Id. at 1360–1362 (Member Cohen, dissenting).

[9] 362 NLRB No. 167 (2015).

[10] Id., slip op. at 5. The fact that nearly all of Northwestern's football competitors are public universities over which the Board lacks jurisdiction prompted the Board to state: "Under these circumstances, there is an inherent asymmetry of the labor relations regulatory regimes applicable to individual teams. In other contexts, the Board's assertion of jurisdiction helps promote uniformity and stability, but in this case, asserting jurisdiction would not have that effect because the Board cannot regulate most FBS teams. Accordingly, asserting jurisdiction would not promote stability in labor relations." Id.